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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 980

THEODORE GOLDMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Theodore Goldman respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on March 26th, 1941, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on July 26th, 1940, convicting the petitioner of conspiracy (18 U. S. Code, Sec. 88) to attempt to obtain money for acting or forbearing to act in a bankruptcy proceeding (11 U. S. Code, Sec. 52 [b]).

Statement of Matters Involved.

Petitioner is a member of the New York and Federal bars. He was indicted, along with Jacob P. Shulman, and Martin M. Goldman, likewise attorneys, and one Samuel I. Kandell. The conspiracy consisted, it was charged, in fraudulently causing a petition in bankruptcy to be filed against one Hymowitz and subsequently attempting to obtain $400 from several persons (principally one Robert Hoffman, attorney for the bankrupt and for his assignee) in consideration of causing the petition to be dismissed and forbearing to act in opposition to the dismissal.

As to defendant Kandell, the indictment was dismissed at the close of the Government's case (fol. 1593; subsequent numerical references indicate folio numbers in the transcript of record). The other defendants, including this petitioner, were found guilty after trial before the Hon. Sidney C. Mize, U. S. D. J., and each was sentenced to eighteen months imprisonment (2828, 2834-2835). Each defendant was admitted to bail pending appeal (2850), the learned trial judge recognizing the existence of "a substantial question," "a question that ought to be passed upon by an appellate court" (2845).

The details of the Government's case are outlined in the opinion of Chase, Cir. J., to which reference is respectfully made. Although the present application is predicated upon points of law, petitioner has at all times steadfastly insisted upon his innocence of any wrongdoing, and nothing herein contained is to be deemed in derogation of that position.

It is undisputed that Hoffman was acting in concert with representatives of the Federal Bureau of Investigation (607-609) for the dual purpose of entrapping and obtaining evidence against the several defendants. The manner in which these agents proceeded to obtain this evidence and the subsequent reception of the evidence

against defendants on the trial give rise to the important questions of constitutional right and statutory construction involved herein.

The trial was preceded by a preliminary motion to suppress the evidence procured by the Government in violation of defendants' constitutional rights and of the Communications Act of 1934 (47 U. S. C., Sec. 605). Upon consent of counsel the motion was reserved for the trial (32). While the matter was raised in the first instance by defendant Shulman, the resulting pre-trial hearing was actively participated in by this petitioner. On the request of his counsel the ruling to be made on the hearing was declared by the Court to apply to all the defendants (252). The adverse determination of the issues on that hearing was rendered with express exception to all the defendants (503), which was reiterated during the actual trial (1144-1145).

I.

During the evening of April 6th, 1937, while the alleged conspiracy was in progress, several agents of the Federal Bureau of Investigation, without warrant and without the permission of defendant Shulman, managed to obtain entrance to his office at 277 Broadway, New York City, in his absence. They studied the layout of the office and installed a microphone in an aperture between the wall of that office (Room 1509) and the adjoining vacant office (Room 1508). The microphone was connected by wire to an amplifier located in Room 1508. They tested it to see that it was working properly. The purpose, of course, was to enable them by listening in the adjoining office, to overhear conversations and sounds in Schulman's office (165-171, 196-198, 205, 217-220, 257-258, 261-276, 360). In addition to this listening device, they also affixed to the wall of the adjoining office an instrument known as a

detectaphone. This was a delicate crystal receiving apparatus capable of picking up and conducting through the wall all sounds emanating from Shulman's office and amplifying them so as to make them audible to persons listening in the adjoining office (280-281, 312, 478). The two instruments must be differentiated—needlessly and illogically, this petitioner contends—inasmuch as the Courts below professed to distinguish between the microphone in the hole and the detectaphone on the wall. The occasion for adopting different rules of law as to the two devices was afforded by the testimony of the Government agents that they abandoned the first and made use only of the second (359, 481). They gave this testimony notwithstanding the fact that in opposition to the motion to suppress, the Government submitted the affidavit of Special Agent Harold P. Turner describing in detail the installation of the hole microphone, declaring "the apparatus installed was solely for listening in on conversations taking place in Rooms 1509-1510", but not so much as mentioning the second device (the detectaphone) through which alone the agents thereafter testified that the conversations were heard (121-125, 408-419):

The determination of the trial Court as to each eavesdropping device is best noted *in haec verba*. As to the first (493-494):

> "As a conclusion of law I will hold that if any testimony were obtained from that first device, by which the wires were extended into the office of 1509, that if there had been any evidence obtained through that method I would have sustained an objection to it and suppressed that evidence, because I think it was an invasion of the defendant's constitutional rights. I think that was a trespass when they went into the office of 1509 by the method by which they did and undertook to install that device. And if any

testimony had been obtained through that device it would have been suppressed.

"I find as a fact, however, that no testimony was obtained through that device, and from the testimony of the witnesses for the Government produced, all of them say that none was obtained."

As to the second (the detectaphone, or microphone attached to the wall), the Court ruled (494-496):

"The other device that was installed was by lawful entry into room 1508. In so far as these defendants were concerned it was lawful. The Government agents attached this listening device to the wall in 1508, and heard some conversations. I think those conversations, if they are relevant to the issues involved upon the trial of the case on its merits, are competent and should not be suppressed; that there is no connection between the two devices, and the fact that they unlawfully entered the office of the defendants on April 6th, aided them in no way whatever in attaching the device to the wall in 1508 on the 7th of April; that I find from the testimony that they could have just as easily and just as well, by the method that they did adopt, of trying out various places on the wall in room 1508, and determined and located the space upon which this device should be attached there, as if they had never been in 1509, and that therefore the constitutional rights of the defendants were not violated by going into 1508 and there attaching listening instruments and taking down any conversations that they might have heard over that device solely, and that if the conversations that were heard are relevant to the issues to be heard on the merits of the case, then the testimony would be admissible and the objections of the defendants on

the ground that their constitutional rights were invaded would be overruled."

The testimony of the Federal Bureau of Investigation stenographer (1114-1357), consisting mainly of a reading of his stenotype notes of the conversations thus overheard—to which conversations, defendant Shulman, defendant Martin Goldman and Hoffman were parties—was a substantial part of the Government's case against all the defendants.

As will more fully be explained in the subjoining brief, the entire process of installing, testing and using one of two alternative listening devices, constituted a single, simultaneous transaction, from which it is not possible to dissociate a legal component. Secondly, though the only instrumentality considered were the second apparatus, its use in the circumstances described would be an invasion of petitioner's constitutional rights.

II.

Wholly apart from anything that has yet been mentioned with regard to the microphone or microphones used by the Government agents, the process of scientific eavesdropping produced, *inter alia*, the contents of one end (namely, the end in Shulman's office) of at least seven telephone conversations. As soon as it developed through the testimony of the Government agents, counsel argued (502) "that there was an interception of telephone messages which in my opinion are just as much a violation of the Federal Communications Act of 1932 and 1933 as it would be as if those wires were tapped." The trial Court, however, ruled (502) "that that is not the type of telephone wires within the meaning of the Communications Act" and granted an exception applicable to all the defendants (503). Accordingly, and in pursuance of this ruling, the Government was permitted to read into

evidence the contents, so far as audible to the microphone, of these seven telephone conversations. Their location in the transcript of record is as follows:

1. Fols. 1225-1229.
2. Fols. 1238-1239.
3. Fols. 1239-1240.
4. Fols. 1260-1261.
5. Fol. 1299.
6. Fols. 1333-1345.
7. Fols. 1347-1348.

At least two of the conversations—the first and the sixth—relate directly to the subject-matter of the indictment, and clearly comprehend matter that is susceptible of an incriminating construction against the defendants. Indeed, the Circuit Court of Appeals in its opinion herein saw fit to quote at some length from the first of the conversations in aid of its holding that the evidence established the existence of the alleged conspiracy. Nevertheless, the Circuit Court ruled, "No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934 as construed in *Nardone* v. *United States*, 308 U. S. 338." Petitioner contends that this holding was error.

III.

Prior to their testifying, the several special agents of the Federal Bureau of Investigation refreshed their respective recollections by consulting the memoranda they had made with regard to the subject-matter of their testimony. It was admitted that each witness, before he took the stand, looked over the penciled notes made by him contemporaneously with the event as well as typewritten memoranda dictated by him therefrom; without utilizing this manner of refreshing his recollection, he would not

have been able to give divers essential details of the evidence (316-318, 367-396, 466-468, 1441-1446). The memoranda in question covered the important subjects of the entry into Shulman's office by the agents, the installation of both listening devices and the actual listening procedure. The witnesses admitted variations between their respective memoranda.

Under these circumstances the question arose both on the preliminary hearing (319-330, 367-387, 394-396, 451-453, 466-469) and on the trial (1408-1425, 1441-1455, 1471-1473) whether counsel for defendants should not be permitted to inspect these memoranda. While the trial Court, after inspecting one of the reports, dated April 9th, 1937, at first announced it would "permit that to be inspected and cross examined about" (378-379), it later reversed this ruling on the theory that inspection was barred unless the witness actually made use of the memorandum while on the stand (382-384, 1411-1413, 1423-1425, 1444-1446). The prejudicial nature of this holding appears from the following factor, among others: petitioner was precluded from ascertaining whether the Government agents in fact did any of their listening by means of the first device—which both the trial Court and the Circuit Court of Appeals held to have been installed by trespass to the extent that any of the fruits thereof would be rendered unavailable from the constitutional standpoint.

Questions Presented.

I.

(a) Was the reception of evidence against petitioner, which evidence was obtained by the employment of microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of one of the defendants, a violation of petitioner's

rights under the Fourth Amendment to the Constitution of the United States?

(b) Was the use of a detectaphone in an adjoining office for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, an invasion of petitioner's rights under the Fourth Amendment to the Constitution of the United States?

II.

Was the use of a detectaphone for the amplification and recording of portions of telephone conversations (without the authorization or consent of either party thereto), the contents of which were subsequently used as evidence against defendants in a criminal trial, an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act?

III.

(a) Is counsel for defendant in a criminal cause entitled to inspect a memorandum used by a Government witness to refresh his recollection prior to testifying?

(b) Where such a memorandum concededly relates to the manner of obtaining evidence and may involve proof of violation of defendant's constitutional rights, is the refusal to permit inspection thereof by counsel on a preliminary hearing an unauthorized curtailment of defendant's rights within the holding in *Nardone* v. *United States,* 308 U. S. 338?

Statute Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; 47 U. S. C., Sec. 605) provides as follows:

> "Sec. 605. *Unauthorized publication or use of communications.* No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, shall divulge or publish the existence, contents, substance, purport, effect, or

meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Reasons for Allowance of Writ.

1. The decision of the Court below, holding admissible the evidence obtained by an unlawful invasion of the right of personal security, contravenes the Fourth Amendment as construed by applicable decisions of the Supreme Court of the United States.

2. The decision of the Court below sanctioning the use of evidence obtained by a detectaphone and ruling such practice not to be violative of the Fourth Amendment, is a decision upon an important point of Federal law which apparently has not been, but should be, settled by this Court.

3. The decision of the Court below permitting the ascertainment by detectaphone and the subsequent divulgence of the contents of telephone conversations, is a decision on a federal question that is either in conflict with applicable decisions of this Court or is upon an important point of Federal law which should be settled by this Court. In any event, it is a decision on a question of substance relating to the construction of a statute of the United States.

4. The decision of the Court below denying to counsel for petitioner the right to inspect memoranda utilized by

Government witnesses to refresh their recollections prior to testifying, is a decision on an important question of general law in a way that is probably untenable.

5. The decision denying the same right to inspect on the preliminary hearing, notwithstanding the strong likelihood of eliciting proof of invasion of constitutional rights, is a decision improperly abridging the scope of the preliminary hearing, and is a decision on a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., April 22nd, 1941.

THEODORE GOLDMAN,
by JACOB W. FRIEDMAN,
Counsel for Petitioner,
Theodore Goldman.